

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

-----X
: STEVEN KNURR et al :
: :
: versus : Civil Action Number
: :
: ORBITAL ATK INC.et al : 1:16-CV-1031
: :
: Defendant. :
-----X

November 4, 2016

The above-entitled jury trial was continued
before the Honorable T.S. ELLIS, United States
District Judge.

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P R O C E E D I N G S

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THE COURT: You may call the next matter.

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THE DEPUTY CLERK: Steven Knurr et al versus
Orbital ATK Inc. Et al; 1:16-CV-1031. Counsel, please
note your appearance for the record.

7

8

THE COURT: All right. For the plaintiff who is
here?

9

MS. PODOLSKY: Good morning, Your Honor.

10

THE COURT: For the plaintiff.

11

12

MS. PODOLSKY: For the plaintiff, I don't know
that we have a plaintiff here. We have two --

13

14

THE COURT: Oh, that's right. You all are here
fighting over the purse.

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MS. PODOLSKY: Correct. We are two movants and
the defense.

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THE COURT: All right. Go ahead, Ms. Podolsky.

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MS. PODOLSKY: Thank you, Your Honor. Susan
Podolsky on behalf of Arkansas Teacher Retirement System.
And I have with me Mr. Naumon Amjed from the Kessler Topaz
firm. And also Francis McConville from the Labaton
Sucharow firm. I've also brought with me Mr. George
Hopkins, who is the executive director of Arkansas Teacher
Retirement System, if the Court wants to ask him
questions, but he's here to participate.

1 THE COURT: All right.

2 MR. REILLY: Good morning, Your Honor. Craig
3 Reilly here for the Construction Laborers Pension Trust of
4 Greater St. Louis, one of the movants. I would like to
5 introduce the Court to my co-counsel, Danielle Myers and
6 James Barz, B-A-R-Z. And Ms. Myers will address the
7 Court.

8 THE COURT: All right. Thank you.

9 MR. ROBERTS: Lyle Roberts with Cooley Law Firm
10 on behalf of the defendants.

11 THE COURT: You don't have a dog in this hunt, do
12 you?

13 MR. ROBERTS: Not exactly, Your Honor, but we
14 have made a submission to the Court on this issue.

15 THE COURT: Yes. I wonder why. Why you think
16 you should be heard on it? But I'll ask you that in a few
17 minutes.

18 All right. In fact I might deal with that two
19 minor issues to begin with.

20 First of all, I was reminded of my first
21 introduction to attorney affidavits. Many, many years
22 ago, close to 45, when I first was involved in cases in
23 the Southern District of New York, I was shocked and
24 surprised to find a flurry of lawyer affidavits. They
25 were common. I thought that was odd. 45 years later, I

1 still think it's odd. I think it's very odd. Because, I
2 think what attorneys say is generally representation. If
3 it's a sworn fact, and if it's disputed, what am I to do,
4 put them on the stand and have them cross-examined? I
5 don't think so.

6 So, I merely point this out -- I mean these
7 affidavits don't do anything, but to say this is a true
8 and correct copy of a resume. How does a lawyer know
9 that? I think they are a waste. But, they are also a way
10 to suspect that there might not be knowledge. So, I would
11 avoid it. I would avoid submitting affidavits by lawyers
12 in this case. A true and correct copy of this or that.
13 There is almost never any dispute about it. I would
14 prefer to have representations. Now it's a minor point.

15 And let me turn to the defendant in this matter
16 and just give me a very brief -- I was curious of why,
17 even though you don't have a formal dog in this hunt, you
18 still want to be heard on it.

19 MR. ROBERTS: Certainly, Your Honor. I think
20 really for two reasons. First, is that, in looking at
21 Your Honor's past cases in the area of security litigation
22 and on the issue of lead plaintiff selection, you pointed
23 out the Computer Sciences case that you would like to hear
24 if defendants have any issue about one of the applicants
25 that is likely to come up on class certification. So, we

1 put in our submission in order to meet what we thought was
2 Your Honor's instructions.

3 THE COURT: Your submission doesn't really raise
4 any argument about the adequacy of either of the two
5 candidates, does it?

6 MR. ROBERTS: Well, Your Honor, I think --

7 THE COURT: Can you give me a yes or a no?

8 MR. ROBERTS: I think it does raise a potential
9 issue about the adequacy of Arkansas Teachers. And, the
10 potential issue is that there are significant pay to play
11 allegations and information out there about the
12 relationship between Arkansas Teachers and it's selected
13 counsel in this case. That's something that we think we
14 will have to explore quite extensively in discovery and
15 the potential issue of adequacy at class certification.

16 THE COURT: Why?

17 MR. ROBERTS: Well, Your Honor, I think there are
18 a number of cases that --

19 THE COURT: What do you mean by "pay to play"?
20 We hear that over and over again on the news these days.
21 Exactly what do you mean by the use of that term?

22 MR. ROBERTS: In this particular instance, Your
23 Honor, there were a series of donations made by the law
24 firm to one of the board members of Arkansas Teachers.
25 That board member was subsequently convicted of a bribery

1 claim not as to the donations from the law firm, but as to
2 a similar set of circumstances where the state treasurer
3 had handed out business from the state in return for
4 kickbacks. And so in light of that factual scenario, it's
5 something --

6 THE COURT: How would you present that to the
7 Court?

8 MR. ROBERTS: I'm sorry, Your Honor.

9 THE COURT: How did you present that?

10 MR. ROBERTS: We presented that -- well, perhaps,
11 Your Honor, in a way that you didn't care for it. In the
12 sense of an attorney declaration --

13 THE COURT: That's right.

14 MR. ROBERTS: We certainly did present a public
15 information --

16 THE COURT: Do you think that Arkansas Teachers
17 would agree with your characterization? I suspect not.
18 In which case, would you then go to the stand and be
19 cross-examined about your characterization of those facts?

20 MR. ROBERTS: I don't think we drew any
21 characterizations of those facts. I think --

22 THE COURT: All facts are characterized. You
23 can't report them. Even if you said it was not raining
24 outside, it was only drizzling, there would be a dispute.

25 But anyway, there is no statutory -- there is no

1 statutory bar to your expressing of view about this.
2 Obviously, when a defendant expresses a view against a
3 particular representation, it causes the fact finder to
4 say, "Gee whiz, they are afraid of those people so maybe
5 those people are the best people."

6 MR. ROBERTS: Can I explain why that isn't the
7 case here, Your Honor? Both applicants are represented by
8 able law firms. They are both institutional investors.
9 We don't have a dog in the hunt in the sense of which one
10 of those we face as part of this litigation. What we are
11 concerned about, and I think the Court should take into
12 consideration as to whether it will exercise it's
13 discretion and give a waiver to the professional plaintiff
14 bar to Arkansas Teachers, is that we will have to engage
15 in a lot of time, effort and resources both on behalf of
16 the parties and the Court in exploring these allegations
17 and determining whether they raise an issue for adequacy
18 and class certification. We think that's a factor the
19 Court should take into consideration when its exercising
20 its submission here.

21 THE COURT: All right. Thank you.

22 MS. PODOLSKY: Would the Court like to hear from
23 Arkansas Teacher on that point?

24 THE COURT: Why don't I hear from Arkansas
25 Teachers on all the points.

1 MS. PODOLSKY: Yes, sir. I'm happy to do that.

2 I'll be presenting on behalf of Arkansas Teachers. I'm
3 happy to start there or I'm happy to start where I was
4 originally planning to start or wherever the Court --

5 THE COURT: Earn the big dollars that you are
6 paid and exercise your judgment.

7 MS. PODOLSKY: Yes, sir, I will. I will point
8 out that this is -- these cases are and this case will be
9 obviously taken on a contingency basis. So, even if
10 Arkansas Teachers are appointed, eventually the fee
11 decision made by you, if there is a favorable result. So
12 at this point right now I've not earned any -- made any
13 big bucks but hopefully I will earn them.

14 So where I would start, Judge, is talking about
15 Arkansas Teacher. And I would like to do that because I
16 agree with you 100 percent. We have a bulls eye on our
17 back in this hearing and I think it is because we are the
18 toughest opponent. And, I say that based on the
19 declaration of Mr. Hopkins, not my declaration, but the
20 evidence that we have submitted, it was through the
21 declaration of Mr. Hopkins and then the settlements also
22 that we had brought to the Court's attention.

23 So, Mr. Hopkins is the executive director of
24 Arkansas Teacher. He tells you in his declaration very
25 clearly that he takes that obligation very seriously.

1 That he has a fiduciary obligation to the fund. To
2 fund -- the fund of the retirement system for the
3 teachers, the bus drivers -- school bus driver, the
4 lunchroom workers. The fund has \$15 billion in assets.
5 And, it's part of his job to protect and safeguard the
6 fund.

7 When the fund is harmed by a fraud or an alleged
8 fraud, he takes it very seriously. He tells you very
9 clearly, and we make no bones about this, we're not
10 running from it at all, Judge. He takes the opportunity
11 to exercise his statutory right to vigorously pursue and
12 vigorously prosecute the securities action. He's done
13 that numerous times. He's here to do it today. He has
14 the three of us here to represent Arkansas Teacher and to
15 tell you that we have every intention and we have every
16 commitment and dedication to do that. Mr. Hopkins tells
17 you in his declaration that he has the resources to do it.
18 He has himself and he is an attorney, has been an attorney
19 for 30 years, licensed -- I beg your pardon -- 29 years.
20 So, he has, he himself, has experience as an attorney in
21 this subject matter. He has extraordinary experience as
22 the executive director of Arkansas Teacher in managing the
23 law firms and in running these cases, because he is not a
24 wildflower or a potted plant. He is an active,
25 passionate --

1 THE COURT: You're dating yourself Ms. Podolsky.
2 There aren't but just a few people in the courtroom who
3 remembers the reference to a potted palm.

4 MS. PODOLSKY: Well, hopefully you are one of
5 them.

6 THE COURT: Unfortunately I am one of them. In
7 fact, I can probably remember hearing "This is the day
8 that will live in infamy." Not many people remember that.

9 MS. PODOLSKY: In the same category, yes, sir,
10 absolutely.

11 So what he does say in his declaration is that
12 he has developed the practicing methods to do that. He
13 has a staff of himself plus four other lawyers, plus other
14 professionals who help him do that. He is actively
15 involved in the cases, in the case strategy, the trial
16 strategy, the discovery strategy. He attends mediations.
17 He drills down on settlement offers that comes to him. He
18 drills down on the settlement offers that go out.

19 So, I just want to make clear that he has given
20 you evidence in the form of his own declaration that
21 substantiates my statements that he -- that Arkansas
22 Teacher and we are fully prepared to prosecute the
23 litigation.

24 We have or Mr. Hopkins, let me say, on behalf of
25 Arkansas Teacher and on behalf of the classes whom he has

1 also represented as a lead plaintiff in many actions, has
2 obtained over \$800,000,000 in successful results for the
3 class members. So as I said, and I don't mean to repeat
4 myself, we're not running from the fact that we do this on
5 a frequent basis. I just want to make clear why that is.

6 THE COURT: Well, then let's go to the central
7 issue as a concession of the shortness of life.

8 MS. PODOLSKY: Yes, sir.

9 THE COURT: The real issue is not who has the
10 largest potential loss, because that's pretty clear. The
11 issue is whether your client should be barred since it had
12 five cases, more than five cases, within the last three
13 years.

14 MS. PODOLSKY: Yes, Your Honor.

15 THE COURT: And the statute makes clear that
16 that's a presumptive bar. Why shouldn't I respect that
17 even though it's not perhaps absolute and appoint the
18 other candidate?

19 MS. PODOLSKY: I will give you all of these
20 reasons. Number one, that argument, being most of it by
21 the Robbins Geller firm, had not succeeded since 2009.
22 It's been advanced numerous times. We gave you 10 cases
23 in our brief starting in 2010 forward. That argument has
24 never succeeded, not once.

25 THE COURT: What does that tell me other than

1 judges ignore Congress?

2 MS. PODOLSKY: No, I believe what it tells you --
3 and if you look at the *Extreme Networks* case, which is a
4 2016 case, in which I would commend you -- it's the best
5 most recent and the best explanation of the statute its
6 purpose and legislative intent, and also the provision
7 that you're referencing the discretion of the Court. In
8 that case, the Court says that the growing -- what that
9 number indicates is that the -- in the volume in the case,
10 is that there's a trend among all the courts because they
11 agree that what Congress meant was to restrict
12 professional plaintiffs, not restrict institutional
13 investors. There is not a single case dealing with
14 Arkansas Teacher or not. Not a single case since 2009
15 that has applied this provision.

16 THE COURT: So, you think I should read into the
17 statute an exception for institutional investors; but it
18 isn't there, is it?

19 MS. PODOLSKY: No, sir. The answer to your
20 question is that statute says, "consistent with the
21 purposes of this section." That's what the statute says.
22 "Consistent with the purpose of this section." No person
23 may prosecute more -- there's a five and three. More than
24 five cases in three years. The legislative intent is
25 abundantly clear. And it defines what "professional

1 plaintiff" means. It says, "The purpose of the provision.
2 . ." -- and no one disagrees with this -- "The purpose of
3 the provision is to restrict professional plaintiffs."
4 The legislative history defines professional plaintiff.
5 The legislative --

6 THE COURT: I can tell you're not a fan of
7 Justice Scalia. He wouldn't read all of these other
8 signs. He would look at the language of the statute.
9 Does the statute define "person" anywhere?

10 MS. PODOLSKY: The statute does not define
11 person. So, exactly in that circumstance Justice Scalia
12 would agree that you look to the legislative intent,
13 because "person" is not defined. The dictionary --

14 THE COURT: You need to read Justice Scalia a
15 little more carefully. I don't think he would agree with
16 you. But anyway I take your point that your view is that
17 because the statute says "person" that it doesn't include
18 institutional investors.

19 MS. PODOLSKY: More than that.

20 THE COURT: Suppose for a moment I don't agree
21 with that, what's the next argument?

22 MS. PODOLSKY: The statute says "professional
23 plaintiff." And the --

24 THE COURT: I thought you said it said,
25 "professional person" or said "person" "no persons."

1 MS. PODOLSKY: I beg your pardon. The title of
2 that provision is "professional plaintiff" and then
3 there's a period and then it goes on to say "person."

4 THE COURT: The title is not Congresses. The
5 title is done by some person in the staff office. So, it
6 isn't a congressional act that goes to the president that
7 says "professional person," is it?

8 MS. PODOLSKY: I'm not actually sure about that
9 because it's in -- I believe it's in the actual text of
10 the statute. I'm not saying you're wrong --

11 THE COURT: No, I'm talking about the title.

12 MS. PODOLSKY: The title, yes, but this little
13 section says "professional plaintiff." And then the
14 legislative history, the conference reports specifically
15 defines "professional plaintiff." The conference report,
16 which is the report that comes out of both houses, as you
17 know, says, "Professional plaintiffs who own a nominal
18 number of shares. . ." Which is not Arkansas Teacher,
19 right? We have 49,000 shares and we invested over
20 \$4,000,000 to purchase those 49,000 shares. That is not
21 us. Professional plaintiffs who own a nominal number of
22 shares in a wide array of public companies permit lawyers
23 readily to file abusive securities class action lawsuits.
24 These lead plaintiffs often receive compensation in a form
25 of a bounty payment or bonuses. That's also not the case

1 here. Right?

2 So, that's what a professional plaintiff is in
3 the legislative history of the statute. A professional
4 plaintiff is a person who owns a nominal number of shares
5 and who receives compensation in the form of a bounty
6 payment or a bonus. It is abundantly clear that this
7 statute was enacted in order to discourage precisely that
8 sort of practice in favor of encouraging. And this is all
9 over the legislative history and we cited profusely in our
10 papers. In favor of the institutional investor, because
11 of what Congress wanted to do was to ensure that
12 institutional investors who has a large investment and who
13 have the resources that Arkansas Teacher has -- both of
14 which Arkansas Teacher has -- that those are the lead
15 plaintiffs in these cases because they can vigorously and
16 zealously prosecute -- I'll say potential in order to be
17 fair to Mr. Roberts and his client and any other potential
18 frauds. And, there is no question that that was the
19 purpose of the PSLRA.

20 And, in fact the purpose of the section
21 generally says in the legislative history, "These
22 provisions are intended to encourage the most capable
23 representative of the plaintiff class to participate in
24 class action litigation and to exercise supervision and
25 control of the lawyers for the class." These provisions

1 are intended to increase the likelihood that parties with
2 significant holdings and issuers, significant holders,
3 49,000 shares \$4,000,000 worth of shares. "Whose interest
4 are more strongly aligned with the class of shareholders"
5 as is by Arkansas Teachers appointment in numerous cases,
6 successors in numerous cases, "will participate in the
7 litigation and exercise control over the selection and
8 actions of plaintiffs. . ."

9 THE COURT: Tell me --

10 MS. PODOLSKY: Yes.

11 THE COURT: Let's get to the -- enough is enough.
12 I've read all the file briefs and I really was interested
13 in your -- to see if you could elucidate anything more
14 about your position with respect to that provision. But,
15 let me ask you a separate question.

16 You propose in this case that the Court appoint
17 Arkansas Teachers and two law firms. Why two law firms?

18 MS. PODOLSKY: Mr. Hopkins has retained two law
19 firms in this case. I'll first point out that he has a
20 statutory right. The lead plaintiff has a statutory
21 right, plain and simple, in the statute. A statutory
22 right to appoint whomever they choose. The reason we have
23 two appointed here is because he is seeking to obtain the
24 best possible representation and the highest --

25 THE COURT: So, if he had eight law firms that

1 would be all right too? Let me ask you this, in all of
2 these lawsuits that Arkansas Teachers have been involved
3 in --

4 MS. PODOLSKY: Yes, sir.

5 THE COURT: -- whose been the lawyer, the same
6 lawyer?

7 MS. PODOLSKY: No. So, Mr. -- so not unlike a
8 corporation, Mr. Hopkins has a stable of firms whom he
9 retains on different matters.

10 THE COURT: Why did you say, "not unlike a
11 corporation" that should somehow make it okay?

12 MS. PODOLSKY: No, it makes it common. It's not
13 an uncommon practice. It's a common practice for large
14 companies, large funds, managing large assets or running a
15 very big company worth billions.

16 THE COURT: I'm not moved much by two law firms.

17 MS. PODOLSKY: I understand that. And if -- if I
18 may be -- if I may make an assumption, and the Court will
19 certainly correct me if my assumption is incorrect. My
20 assumption is that it's because two law firms could charge
21 more than one law firm and there could be a potential
22 duplication of efforts. Is that your primary concern?
23 Because -- because I'd be happy to address it.

24 I have myself worked with both law firms in this
25 case in this court in front of Judge Brinkema and I have

1 holdings. And I've worked another case in Richmond in
2 front of Judge Gibney with two law firms. So, I can
3 assure you that there is no duplication effort. It
4 doesn't happen --

5 THE COURT: Well, then why aren't there two law
6 firms?

7 MS. PODOLSKY: Because you have two -- I would
8 say two minds are better than one.

9 THE COURT: Well, then why aren't 10 minds better
10 than one?

11 MS. PODOLSKY: Ten could be, but there obviously
12 has to be a --

13 THE COURT: I'm not moved by two law firms.

14 MS. PODOLSKY: Understood.

15 THE COURT: What else do you have?

16 MS. PODOLSKY: I would say that that's not a
17 matter to disqualify Arkansas Teachers though.

18 THE COURT: That -- that's right. That's not a
19 reason to disqualify the Teachers.

20 MS. PODOLSKY: Correct.

21 THE COURT: It is a reason why I might, if I
22 appoint the Teachers, appoint only one law firm. Which of
23 the two law firms would you prefer?

24 MS. PODOLSKY: So, I -- Mr. Hopkins may address
25 that or I'm happy to.

1 THE COURT: No, you can confer with him. I don't
2 want him to address it. You can confer with him and tell
3 me.

4 MS. PODOLSKY: I know his answer.

5 THE COURT: All right, then tell me.

6 MS. PODOLSKY: His answer would be the firm
7 closest in proximity to the Eastern District of Virginia.
8 And that would be the Kessler Topaz firm.

9 THE COURT: All right. Have you said anything or
10 do you have anything to say about this provision that the
11 professional plaintiff won that you haven't said in your
12 briefs that are here today?

13 MS. PODOLSKY: I don't -- I'm hesitating because
14 I believe that all of the points are in the brief. I
15 would take 30 seconds to crystalize.

16 THE COURT: All right. Go ahead.

17 MS. PODOLSKY: I would say that since 2010 all of
18 the cases -- I did say this earlier -- I understand have
19 determined -- have not applied the professional plaintiff
20 provision to an institutional investor to disqualify that
21 institutional investor. I believe that is because these
22 courts are looking at both the statute and the legislative
23 intent and they are exercising their discretion to pick
24 the -- to pick the presumptively -- the presumptive lead
25 plaintiff provided that the Court has that comfort level

1 that the presumptively lead plaintiff would do what the
2 Court expects it to do.

3 When I read these cases, that's what I see.

4 And, that's frankly what I see with respect to the cases
5 where the Court doesn't appoint. The older cases in 2009
6 prior. That's -- that's where I think this boils down to.
7 Is that you have to have that comfort level, because we
8 are the presumptive lead plaintiff under the statute. So,
9 irrespective of whether you and I agree how to read the
10 statute, it is abundant, in terms of whether there's an
11 absolute prohibition, there's not an absolute prohibition,
12 but in terms of whether the statute says it doesn't apply
13 or the statute says you exercise discretion. Either way,
14 it is our view that you come to the same result, because
15 at the end we have given you very clear evidence.
16 Evidence, not just what I have to say, but evidence that
17 Arkansas Teacher will discharge its obligation exactly as
18 this Court expects it to do.

19 So, if we're the presumptive lead plaintiff
20 under the test, there is no reason under those
21 circumstances to disqualify us.

22 THE COURT: All right. Now address what he said
23 and then I'll hear from the other side.

24 MS. PODOLSKY: So, he said that he didn't
25 characterize. First of all, he's relying on newspaper

1 articles. That's what he's given you as facts. Newspaper
2 articles. Other than the fact that there were
3 contributions, and I don't dispute that, but he does
4 characterize it. He's saying there are significant
5 allegations out there which -- where is "out there." And
6 under the same similar set of circumstances the courts
7 have had an issue with a potentially lead plaintiff. So I
8 agree with all of that.

9 First of all, these contributions were in 2009.
10 There are no similar or recent contributions. Mr. Hopkins
11 makes that clear in his declaration. So, you have
12 absolute evidence that there is nothing -- there are no
13 contributions from this firm at all recently.

14 Second of all, the person to whom the
15 contributions were made left office in 2013. So, I don't
16 have any understanding as to how a contribution in 2009 --
17 which by the way is itself legal -- because if it was not
18 illegal, it's a legal contribution in 2009 to a person who
19 leaves office in 2013 had anything to do at all with the
20 appointment of the lead plaintiff counsel in 2016 in this
21 case. Particularly given that that firm has not made any
22 other current contributions. And, on top of all of that,
23 Mr. Hopkins is the person with the exclusive authority to
24 make the decision to retain counsel, to appoint counsel,
25 and to fire counsel. He makes the decision whether to

1 take a case or reject a case. He makes the decision
2 whether to initiate a case on his own and to find someone
3 to do that. He is the sole person with that authority.
4 That authority has been delegated to him by the board of
5 trustees. The board of trustees, as a group, does not
6 influence his decision and does not communicate with him
7 about his decisions, generally speaking. This particular
8 state treasurer, who is a member of the board of trustees,
9 did not communicate with him about this decision and does
10 not communicate generally about these decisions or did not
11 communicate generally about these decisions with him at
12 all. She hasn't been around in terms of holding a state
13 office in three years.

14 Mr. Hopkins was not aware of the contributions
15 until Mr. Roberts brought them to our attention via these
16 articles and his submission. So, in my view this does not
17 amount to a legal hill of beans now or even at class
18 certification if the Court appoints us and we go to class
19 certification and win the case. It's not an issue. There
20 is nothing out there. There are not substantial
21 allegations. The bribery conviction for this state
22 treasurer had nothing at all to do with the contribution
23 in 2009 by the Labaton Sucharow firm. And I mean it had
24 nothing to do with it. It's not a similar circumstance,
25 it's not an identical circumstance, it is not even a

1 remotely, remotely in the same ballpark. She was
2 convicted for kickbacks to a bonded broker. She had cash
3 in a cigar box that was being exchanged back and forth.
4 It was an illegal activity. And in no way shape or form
5 has anything to do with what you're deciding here today.

6 THE COURT: All right. Let me hear from
7 Ms. Myers.

8 MS. PODOLSKY: I do have one case on that if you
9 would like to know.

10 THE COURT: All right.

11 MS. PODOLSKY: That's the Third Circuit in *In Re*
12 *Cendant*. And I'll just say --

13 THE COURT: Is it in your brief?

14 MS. PODOLSKY: Yes, sir, it is.

15 THE COURT: Then I'll find it.

16 MS. PODOLSKY: Thank you very much, sir.

17 THE COURT: All right, Ms. Myers.

18 MS. MYERS: Your Honor, may I please the Court.
19 I think the best spot for me to start is with the case
20 law. The Court is clearly familiar with the statute, what
21 it says, and what the arguments are. So I want to focus
22 on what Arkansas says is basically a futile battle.
23 Because, in the last six years every court has rejected
24 this argument. I want to talk about those decisions.

25 In particular, as they relate to Arkansas

1 Teacher itself, which this argument has been raised
2 against it since 2012, meaning for the last four years it
3 has been in violation of the Professional Plaintiff Bar.

4 They cite six cases in their papers. In four of
5 those six cases, Your Honor, the competing movant was
6 either an individual investor or a group of unrelated
7 individual investors. The case law that we have cited to
8 the Court, and also that they have cited, supports the
9 notion that there must be a need, which the statute also
10 says, except as the Court may otherwise permit, consistent
11 with the purpose of the statute for them to exceed the
12 bar.

13 Well, the cases unanimously agree that when
14 there is a competing movant that is not an institutional
15 investor, it may be appropriate in those circumstances to
16 lift the bar. So in four of their six cases that was the
17 case. And in two of the other six cases, Your Honor, the
18 Court flat out held that the bar did not apply to an
19 institution.

20 Despite the statutory language that says, "In
21 addition to a person, a person can be a lead plaintiff for
22 an officer, director or fiduciary of a lead plaintiff.
23 And Mr. Hopkins here is the executive director of Arkansas
24 Teacher. That is clearly an officer, director or a
25 fiduciary and he has personally signed at least 25 of

1 their certifications in the last three years. So, Your
2 Honor, Mr. Hopkins qualify directly under the statute, the
3 statutory language, that they don't address in any of
4 their briefing, Your Honor. They don't respond to our
5 point on "What does that mean if it doesn't mean Mr.
6 Hopkins?"

7 So, we would submit, Your Honor, that the fact
8 that the last six times this argument has been raised
9 against them has failed, is not the insurmountable battle
10 that they make it out to be.

11 THE COURT: Do you know of any case in which the
12 bar has been enforced against an institutional investor?

13 MS. PODOLSKY: Yes, Your Honor. We've cited
14 several to the Court.

15 THE COURT: What do you think is the most
16 opposite case?

17 MS. MYERS: I believe it's the *Telxon* decision,
18 Your Honor, from the Northern District of Ohio. Which,
19 oddly enough is the very first decision from 1999 by Judge
20 O'Malley that address this. And it lays out not only what
21 the statute says and whether the Court should go into
22 legislative history, but it also addresses the
23 circumstances consistent with the statute and the goals of
24 the statute which we acknowledge what the goals are. They
25 focus on one goal. There's actually three or four goals

1 of the statute, Your Honor. One of them is undoubtedly to
2 encourage institutional investors. But, if you're going
3 to look at the legislative history, there are several
4 other goals that are discussed in that legislative
5 history. Not only the increase of institutional
6 oversight, which in this case, Your Honor, will be
7 satisfied no matter who the Court picks. We're both
8 institutional investors, we both lost a lot of money and
9 both hired good law firms.

10 But there's two other goals they ignore. One of
11 them is to prevent overrepresentation by plaintiffs.
12 That's in the statute. It's clearly in the statutory
13 provision. That goal will not be satisfied if Arkansas
14 Teacher is appointed.

15 There's another goal. The increase in client
16 control over plaintiff's counsel. You know they talked
17 about the fact -- Your Honor asked them, "Well, if there
18 are eight law firms, would you hire them?" The Court can
19 note how many people are in the room today. They in fact
20 have eight people with them.

21 THE COURT: They in fact have what?

22 MS. MYERS: Eight people with them. There are
23 eight lawyers -- seven lawyers.

24 So one of the goals of the PSLRA --

25 THE COURT: How many do you have?

1 MS. MYERS: We have just the three of us, Your
2 Honor.

3 So, one of the goals was to increase client
4 control over plaintiff's counsel. Again, that will not be
5 satisfied if Arkansas is appointed. So they're not only
6 overseeing the 13 active cases, they admit that they've
7 been in 35 in the last three years. But they are
8 outnumbered. They've got two law firms as the Court
9 noted.

10 So, we would submit you need to read the
11 legislative history if you're going to go there, which we
12 don't think you need to. You need to read it holistically
13 and you need to look at all the goals of the statute. And
14 that's what the case law looks at, Your Honor. That's
15 what the cases that they've discussed look at.

16 And I would -- I would submit that, you know,
17 when I was preparing for this hearing, I looked back and I
18 looked at the evolution of this particular statute and the
19 way the cases have evolved over the years. And they said,
20 "You know we haven't been barred yet." They're right and
21 they haven't been barred yet. But, I went back and there
22 was an entity called the Florida State Board of
23 Administration. And three district courts in a row
24 declined to impose the bar on them. Until Judge Harmon in
25 Enron who said, "Nine cases is too many." So, someone

1 lost three times challenging them before a court said
2 "Nine cases is too many and the statute says five." Nine
3 is too many.

4 It happened again with an entity called
5 Louisiana Teachers. They lost -- a competing movant lost
6 twice in a row until Judge Collier in the *UnumProvident*
7 case said, "No, 13 cases is enough." And then, they were
8 barred again in *American Italian Pasta*. And the same
9 thing happened again in another entity where it was barred
10 once. And then another Court said, "No, your eight cases
11 is enough." And in each one of these cases that I just
12 talked about *Enron*, *UnumProvident*, and the *Cunha* case,
13 which we also cite in our papers, the one thing that all
14 of those had in common were alternative institutional
15 investors, sufficiently large losses, that had no
16 typicality or adequate issue that had hired competent
17 counsel that were also not subject to the bar. And this
18 is recognized in all of the decisions both sides have
19 cited to the Court.

20 There has to be a need. It's in the statute
21 itself, Your Honor. It says, "Except as the Court may
22 otherwise permit consistent with the purpose of the
23 statute." That purpose is not just that there's an
24 institution at the helm. The purpose is an institution,
25 client control, no repeat plaintiffs. That's what that

1 provision is targeted at. And these cases all say, they
2 all stand for the proposition that unless there's a need,
3 a clear need, meaning there's no other movant, the
4 competing movants are individual investors and small
5 losses, or, they're competing movants are atypical where
6 they are inadequate. The defendants have challenged them
7 for some reason where their trading is not usual of the
8 class.

9 Then you can lift the bar. And, of course, if
10 the Courts agree on all of these points, there are a
11 handful of decisions, and we admit this, where the Courts
12 have said flat out, "The bar does not apply to
13 institutional investors."

14 We respectfully submit that if the Court goes
15 back and look at the statute and looks at the legislative
16 history, that the statute and the legislative history are
17 actually harmonized, because the legislative history says,
18 "Institutions may need to exceed this limit." And we
19 agree, there may be circumstances -- I just listed four or
20 five of them -- where they may need to exceed the limit.
21 Not a single one of those circumstances is here, Your
22 Honor. And they say we have the burden to prove that they
23 shouldn't be appointed.

24 But that's not what the statute says, Your
25 Honor. The statute is broken up into separate parts. The

1 rebuttable presumption part is Subsection 3 of the
2 statute. The professional plaintiff's section, Your
3 Honor, is a stand alone section. It's Subsection 6. It's
4 on its own a totally separate section. So, to be
5 appointed a lead plaintiff under the way the statute
6 itself is set up, you have to not only satisfy the
7 rebuttable presumption, the section of the statute:
8 Timely move, larger loss, typical inadequate. But, you
9 also have to not be excluded by the five and three bar.
10 They want to subsume the five and three bar under the
11 rebuttable presumption part and say we have to prove they
12 can't be here.

13 We submit, Your Honor, that Congress put the
14 limit and said what "overstretched" means. It's five.
15 They acknowledge in their reply brief they have been in 35
16 cases, Your Honor, since 2013. They have moved or sought
17 to be appointed or been appointed in 21 cases that were
18 filed in the last three years. They admit that they're
19 currently serving in active cases 13 of them, Your Honor.

20 We count 19 because we include cases that are
21 still pending because they are on appeal or the settlement
22 is not done. Regardless, we all agree, everyone in this
23 room, they exceed the limit. The declaration that Mr.
24 Hopkins submitted, he told the Court, and we applaud his
25 candor, that he is going to continue doing this. He said

1 it in two spots. "Until companies stop committing
2 securities fraud, we are going to keep moving." Well,
3 they moved six times in 2015 and they moved six times in
4 2016. So they've got 35 cases now. So is 40 enough? Is
5 45 enough? Is 50 enough? Congress said five, Your Honor.
6 There is not a single court that either side has cited to
7 you that has lifted the bar for a movant that had 35 cases
8 in the last three years. And there is not a single court
9 that has lifted that bar for 35 cases.

10 But, on the other side, there's institutional
11 investors that does not exceed the limit that has served
12 as lead plaintiff and has also recovered money. Not as
13 much because they don't have 35 cases in the last three
14 years, hired one law firm, a qualified law firm, and has a
15 larger loss. And the defendant's haven't raised any
16 issues against them at this stage. Even if they are not
17 entitled to say so. Neither has Arkansas Teacher. So,
18 Arkansas Teacher hadn't actually opposed my motion other
19 than to say I don't have the biggest loss. So they admit
20 that we're qualified.

21 So, Your Honor, we respectfully submit that
22 under the case law, under the statute --

23 THE COURT: And I take you would concede that,
24 apart from this bar, they would be qualified?

25 MS. MYERS: Yes, Your Honor.

1 THE COURT: All right. That's really the issue
2 in this, is that --

3 MS. MYERS: The rubber --

4 THE COURT: -- the statute that says don't
5 appoint person whose had five of these in the last three
6 years?

7 MS. MYERS: Yes, Your Honor. That is where the
8 rubber meets the road.

9 THE COURT: All right. Thank you. Anything
10 else?

11 MS. MYERS: No, thank you, Your Honor.

12 THE COURT: Ms. Podolsky.

13 MS. PODOLSKY: Yes, Your Honor.

14 THE COURT: Why do you think you have a response?

15 MS. PODOLSKY: Beg your pardon?

16 THE COURT: Why do you think you have a response?

17 MS. PODOLSKY: I was going to ask permission to
18 give a quick rebuttal. If the Court is not interested
19 I --

20 THE COURT: Well, then I'll have to give
21 Ms. Myers -- all right, you go ahead, but make it very
22 brief and then I'll give Ms. Myers a chance to respond to
23 only to what you say. But at some point we're -- it's got
24 to be all I hear.

25 MS. PODOLSKY: Understood, sir.

1 THE COURT: But you already killed a small forest
2 in submitting papers to me.

3 MS. PODOLSKY: Yes, sir. I will direct my
4 comments at -- at Ms. Myers comments and I will be brief.

5 With respect to the burden on this provision
6 that the Court is looking at, there is no language, the
7 statute does not say, we have the burden on this
8 plaintiff -- on this -- on this professional plaintiff
9 provision. The statute does not say that we have the
10 burden. If the Court is looking to the text of the
11 statute, it does not say that. There are quotes on both
12 sides, no question about it, that move the burden. I
13 would suggest that the Court look at *Extreme Networks* with
14 respect to that matter.

15 I think *Extreme Networks* give the Court the best
16 explanation of how the legislative history works in
17 conjunction -- in how the two provisions work in
18 conjunction with each other. The *Extreme Networks* is a
19 recent decision, just a few months ago. It is Arkansas
20 Teachers. It is against Robbins Geller. Robbins Geller
21 represents the institutional investor. It is on all fours
22 of this case. And *Extreme Networks* go through very
23 clearly why the reasons in all the cases that Robbins
24 Geller points to why that reasoning was flawed and why it
25 should not be adopted by this Court. Why it is not

1 adopted by *Extreme Networks*, why we suggested it should
2 not be adopted by this Court.

3 You asked -- I apologize, I think it is -- is it
4 Ms. Myers?

5 MS. MYERS: Yes.

6 MS. PODOLSKY: You asked Ms. Myers what's the
7 most opposite case. So, Your Honor, haven't asked me my
8 answer to that question along with *Diamond Foods*.

9 With respect to *Telxon* I will tell you that --

10 THE COURT: I think in your argument you told me
11 what the most opposite case was. That's why I didn't ask
12 you.

13 MS. PODOLSKY: I think I did. Understood.

14 Thank you very much for being, as you always
15 are, listening. I appreciate that.

16 The *Telxon* case is a 1999 case. So it -- it is
17 one of the oldest cases. It is specifically rejected by
18 the decision out of the District of Columbia. That's
19 Judge Leon, I think, quite recently. That reasonably is
20 specifically -- the case is specifically rejected.

21 THE COURT: How does a magistrate judge reject --

22 MS. PODOLSKY: No, Judge Leon, a district judge.

23 THE COURT: I see.

24 MS. PODOLSKY: Sorry, I didn't mean to be
25 unclear. He also addresses *UnumProvident* and *Enron*, which

1 is the other cases that Ms. Myers spoke about and he
2 rejects them.

3 With respect to *Enron*, *Enron* is an outlier. The
4 judge in *Enron* recognized that *Enron* -- he believed that
5 *Enron* was the biggest, baddest, most complicated, most
6 factually intensive securities class action that has ever
7 been brought in the history of the United States. He
8 wanted, specifically, a firm, a lead plaintiff who did not
9 have -- that didn't have anything to do -- I understand
10 that the -- that the argument is made in the context of
11 the five and three provision -- but he wanted an assurance
12 that the lead plaintiff had very few cases, because of the
13 intensity -- what he perceived to be the intensity with
14 the oncoming litigation in *Enron*.

15 He also, with respect to the Florida State
16 Board, was very concerned because he thought there would
17 be a likelihood that Florida State Board, the lead
18 plaintiff, would be suing the investment advisor regarding
19 the purchases of the Enron stock. So he had a concern
20 there that that could potentially create a conflict of
21 interest. So, that's different in that sense.

22 The Louisiana -- Louisiana Pension System that
23 Ms. Myers referred to as a presumptive -- as a lead
24 plaintiff. The cases that she's referring to, they start
25 with a case called *Chiaretti*. That's the first case. And

1 the *Chiaretti* court rejects Louisiana, because it is
2 concerned that the general counsel has several litigations
3 plus two very large funds that it's overseeing.

4 So, that is factually distinct from our case.

5 THE COURT: You've got a lot of cases you're
6 looking at?

7 MS. PODOLSKY: Pardon me.

8 THE COURT: Your client has a lot of cases that
9 they are looking at.

10 MS. PODOLSKY: I understand. The distinction
11 between Arkansas Teacher and Louisiana is that -- and
12 perhaps also Arkansas Teacher and the FBA, the Florida
13 State Board, is that Arkansas Teacher had a specific group
14 of people dedicated to this and more than one.

15 Mr. Hopkins oversees with a professional staff
16 including four lawyers who are -- who are dedicated to the
17 securities.

18 THE COURT: I don't think the Congress intended
19 for district courts to get into precisely how people are
20 going to staff it. But in any event, what else do you
21 have?

22 MS. PODOLSKY: So -- and I --

23 THE COURT: In response to Ms. Myers?

24 MS. PODOLSKY: I understand your point. I would
25 just say if Ms. Myers is making -- is laying the burden of

1 proof on me, then I have to come forward with evidence
2 that I -- that I can do it. And that Mr. Hopkins has to
3 come through with evidence. And that's all I'm --

4 THE COURT: I don't have any doubt you both can
5 do it. The question is who am I going to let do it.

6 MS. PODOLSKY: Yes, Your Honor. So I understand.
7 Ms. Myers -- my final point with respect to this is that
8 -- Ms. Myers makes the point that Congress is prohibiting
9 repeat players. Right? Repeat plaintiffs, repeat
10 players.

11 But that's not -- that's not correct. Because I
12 give you in our brief 20 cases where the Court
13 specifically says, appoints the presumptive lead plaintiff
14 in spite of the fact that it has more than the five cases
15 that are set forth in the statute. So, it's not -- the
16 Court --

17 THE COURT: Maybe they are disobeying Congress.
18 Federal courts do that when they can get away with it.
19 Not many of these cases go to the circuit.

20 MS. PODOLSKY: But, that you're right. You're
21 right. But it is not the case that every -- it is
22 extraordinary unusual, let me put it that way, it is
23 extraordinary unusual for every single court in the
24 country since 2010 to go this way and be violating a
25 provision in a statute. Every single case.

1 THE COURT: No, I can give you many times in
2 history when that's happened.

3 MS. PODOLSKY: I would suggest --

4 THE COURT: Especially in the criminal area. And
5 then the Supreme Court comes and says 9-0 and judges
6 across the country scratch their heads. But anyway I take
7 your point. I'm familiar with all of that.

8 Now just focussing on what Ms. Podolsky [sic]
9 said, do you have anything else you want to bring to my
10 attention?

11 MS. PODOLSKY: May I add one point on the two law
12 firms if you mind?

13 THE COURT: If you do it in a sentence.

14 MS. PODOLSKY: Yes, sir. In *MicroStrategy* you
15 recognized --

16 THE COURT: I'm familiar with that.

17 MS. PODOLSKY: Two firms working together.

18 THE COURT: It doesn't mean that I don't regret
19 it. And that you don't have a come back for.

20 MS. PODOLSKY: No, I don't. I do not, Judge. I
21 don't think Judge Brinkema regrets allowing more than one
22 firm --

23 THE COURT: Well, that's her problem, her
24 business. I don't care.

25 MS. PODOLSKY: Understood.

1 THE COURT: All right. Ms. Myers, do you have
2 anything you want to say in response to that?

3 MS. MYERS: So there are three primary points:
4 Who has the burden, the emphasis of the *Extreme Networks*
5 case, and the 20 cases. I will be very brief.

6 On the burden, Your Honor, if the Court looks at
7 the statutory language, it says, "Except as the Court may
8 otherwise permit, no person may be a lead plaintiff in
9 more than five cases in three years." Where that
10 subsection is located in the statute and the language of
11 that subsection doesn't place the burden on us. It says,
12 "Except as the Court may otherwise permit." That suggest
13 that the person that's barred needs to convince the Court
14 that there is a need consistent with the statute to allow
15 them to exceed the bar.

16 THE COURT: All right. On the issue of burden,
17 do you really think I'm going to decide this case on the
18 basis -- not that the burden isn't an issue between you --
19 but do you really think I'm going to decide this case on
20 the basis of burden that somebody didn't meet their
21 burden?

22 MS. MYERS: No, Your Honor.

23 THE COURT: No, I don't think so either.

24 MS. MYERS: I would like to briefly address --

25 THE COURT: Basically, I've got to be satisfied

1 that I have met the requirements of the statute and
2 basically you're both qualified, your clients are both
3 qualified. I don't see any, with the exception of this
4 one argument here that Ms. Podolsky has addressed, that I
5 think you're both qualified and I think they have the
6 biggest loss, you have the next biggest, and I've got to
7 look at the other factors and decide. And the principle
8 other factor is the five and three years. Otherwise, this
9 would be what -- I don't think anybody here remembers,
10 well I don't know maybe Mr. Cummings does back here --
11 remembers a judge in this court, whose now passed from
12 this veil of tears, and he always was fond of saying
13 "There are two kinds of cases: There are no-brainers and
14 there are really no-brainers."

15 And I -- if there weren't this issue, of course
16 the issue of the five and three, it might be a really
17 no-brainer. We'll see.

18 Do you have anything else? You were getting
19 ready to say something about the case. You know what I'm
20 talking about Mr. Cummings?

21 MR. CUMMINGS: I do.

22 MS. MYERS: Briefly, Your Honor. The *Extreme*
23 *Networks* case, the Court in that case for the Northern
24 District of California said that the word "person" isn't
25 defined in the statute in the section on the repeat

1 plaintiff's bar. So it wasn't clear that apply to
2 institutions.

3 Well, if that holds, Your Honor, that "person"
4 isn't defined, then I don't know that either one of our
5 clients should be here moving, because at the very
6 beginning of the statute when it says, "Who can seek
7 appointment as lead plaintiff?" It says, "Any person or
8 group of persons." And neither one of us are persons.
9 We're entities. So, if the PSLRA.

10 THE COURT: You're a group of persons, right?

11 MS. MYERS: Well, we're not a group of persons --
12 well, yes, we are, Your Honor. So, I would submit that
13 that Courts reading of the statute does not jive with the
14 statute itself, Your Honor.

15 And then finally, the point about the 20 cases,
16 which is kind of their drum beat. Again, we submit that
17 in each one of those cases if the Court goes and looks at
18 all 20 of them, there was a reason -- there was a need
19 consistent with the purpose of the PSLRA to lift the bar
20 and let the institution that had exceeded the limit serve.

21 There was no competing movant. Meaning the
22 motion was unopposed. Well, who is going to seek to
23 oppose the bar when there's no competing movant? There
24 were only individual investors. The other investors were
25 otherwise atypical or inadequate. Or, candidly, the Court

1 just said it doesn't apply to an institution. So we
2 submit that those 20 cases, where the Court declined to
3 exercise its discretion, they are not binding on this
4 Court, Your Honor. Thank you.

5 THE COURT: All right. Thank you. The arguments
6 have been helpful. Your briefs have been helpful, but I
7 think I have it. I am going to reflect on the arguments
8 that you've made today. They have been helpful. And I'll
9 let you hear from me promptly because it needs to be
10 resolved very promptly. Thank you.

11 MS. MYERS: Thank you, Your Honor.

12

13 **(Proceedings adjourned at 11:52 a.m.)**

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CERTIFICATE OF REPORTER

I, Tonia Harris, an Official Court Reporter for the Eastern District of Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the motion's hearing in the case of the **STEVEN KNURR, et al versus ORBITAL ATK INC.et al**, 1:16-CV-1031, in said court on the 4th day of November, 2016.

I further certify that the foregoing 44 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, my computer realtime display, together with the backup tape recording of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this the December 1, 2016.

Tonia M. Harris, RPR
Official Court Reporter